Liew Nyuk Ching v Jong Khee Kie

HIGH COURT (KUCHING) — DIVORCE PETITION NO KCH-33–113/3 OF 2012
RHODZARIAH BUJANG J
22 APRIL 2013

Civil Procedure — Setting aside — Decree — Application to set aside decree nisi and decree absolute — Two notices of application — First notice superfluous following filing of second notice — Terms of decree nisi against interest of husband — Husband did not accept service of petition and service of hearing — Decision in Chng Yock Eng v Kwa Teck Meng [2004] SGDC 268 in which judge set aside decree nisi and absolute on despite finding that petition had been properly served — Whether decrees ought to be set aside — Divorce and Matrimonial Proceedings Rules 1980 r 44

The husband respondent in the present application sought to set aside both the decree nisi and decree absolute granted by the court. Initially, two notices of application were filed. The earlier one filed was to set aside the decree nisi but after its filing and before it was heard the decree was made absolute. The filing of a second one was necessitated by event. Despite filing the second application, the husband respondent did not withdraw the first notice. The first notice had been rendered superfluous by the filing of the second one. However, when the decree nisi was granted at the hearing, the husband respondent was absent. According to the court document, the petition and the notice of hearing were served to the husband respondent by way of publication in a newspaper. In the affidavit of non-service filed in support of the application for substituted service, it was deposed by the process server that the husband respondent was approached by him of which he refused to accept. An earlier attempt at service failed because the husband respondent was not at his given address. He did not want to sign any documents then because it might prejudice him and at the material time, he was under the impression that the meeting was for the purpose of reconciliation. It was his contention that only after being served with the decree nisi did he go to the office of his counsel for legal advice. The terms of the decree nisi was obviously against his interest, both personal and financial in that he was not given any access to his children and had to give the wife petitioner a share in an inherited property. Despite these two applications being served on the wife petitioner as well as on the advocate representing her, the wife petitioner also did not appear at the hearing of the application. The husband respondent's joint written submission canvassed its argument on the decision of the Singapore District Court in *Chng Yock Eng v Kwa Teck Meng* [2004] SGDC 268 in which the judge was moved to set aside the decree nisi and absolute on the merits. This decision was made despite the

judge finding that the petition had been properly served by substituted service to the respondent.

Held:

(1) This decision was not that of the High Court of Singapore which would be highly persuasive. The court acknowledge that in Singapore, the district court (equivalent to our sessions court) had jurisdiction over divorce and matrimonial matters and given its jurisdiction, is like the High Court in Malaysia, the ratio was still relevant to this case. The court agreed with the principle so stated such that it was seized with the jurisdiction to entertain the application of the husband respondent and to also consider the merits of the grounds advanced for a re-hearing of the petition (see para 6).

(2) When the court examined the unopposed and uncontradicted affidavit evidence of the husband respondent in particular on the transfer of the half share in the matrimonial property and the blanket denial of access to the children of the marriage as well as the fact that the husband respondent was not informed of the application to make the decree nisi absolute, the granting of this application was a foregone conclusion (see para 8).

(3) The court ordered the first application to be struck out with no order as to cost; that both the decrees be set aside and that there be a rehearing of the petition; that the husband respondent be given leave to file his answer to the petition within 14 days from today and the wife petitioner, her reply, within 14 days from the date of service of the said answer to the petition; and the cost of this second application was to be borne by the husband respondent himself on account of fact that there was regular service of the petition (see para 9).

[Bahasa Malaysia summary

Responden isteri dalam permohonan ini memohon untuk mengetepikan kedua-dua dekri nisi dan dekri mutlak yang diberikan oleh mahkamah. Pada mulanya, dua notis permohonan difailkan. Notis pertama difailkan untuk mengetepikan dekri nisi tetapi selepas pemfailannya dan sebelum ia didengar dekri dibuat mutlak. Pemfailan notis kedua diperlukan akibat keadaan. Meskipun memfailkan permohonan kedua, responden tidak menarik balik notis pertama. Notis pertama telah disebabkan tidak perlu dengan pemfailan notis kedua. Walau bagaimanapun, apabila dekri nisi diberikan pada pendengaran, responden suami tidak hadir. Mengikut dokumen mahkamah, petisyen dan notis pendengaran diserahkan kepada responden melalui penerbitan di dalam surat khabar. Di dalam afidavit yang tidak diserahkan, difailkan dalam menyokong permohonan untuk penyerahan ganti, ia didepos oleh penyerah yang mana menemui responden tetapi dia menolak daripada

menerimanya. Percubaan terdahulu penyerahan gagal kerana responden tidak berada di alamat yang diberinya. Dia enggan menandatangani apa-apa dokumen pada masa itu kerana ia mungkin memprejudiskannya dan pada masa material, dia beranggapan bahawa perjumpaan tersebut adalah untuk tujuan perdamaian. Adalah hujahannya bahawa hanya selepas diserahkan dengan dekri dia telah ke pejabat peguamnya untuk mendapatkan nasihat undang-undang. Terma-terma dekri nisi jelas bertentangan kepentingan, peribadi dan kewangannya yang mana dia tidak diberi akses kepada anak-anaknya dan terpaksa memberi kepada pempetisyen syer dalam hartanah yang diwarisinya. Meskipun kedua-dua permohonan ini diserahkan ke atas pempetisyen isteri dan juga ke atas penguambela yang mewakilinya, pempetisyen isteri juga tidak hadir pada masa pendengaran permohonan tersebut. Hujahan bertulis bersama responden mendapatkan sokongan dalam hujahannya atas keputusan Mahkamah Daerah Singapura dalam kes *Chng Yock Eng v Kwa Teck Meng* [2004] SGDC 268 di mana hakim memutuskan untuk mengetepikan dekri nisi dan mutlak atas merit. Keputusan ini dibuat walaupun hakim mendapati yang petisyen telah diserahkan secara betul oleh penyerahan ganti kepada responden.

Diputuskan:

(1) Keputusan ini bukan keputusan Mahkamah Tinggi Singapura yang sangat meyakinkan. Mahkamah mengakui bahawa di Singapura, mahkamah daerah (bersamaan mahkamah sesyen kita) mempunyai bidang kuasa ke atas perkara perceraian dan perkahwinan dan diberikan bidang kuasanya, seperti Mahkamah Tinggi di Malaysia, ratio masih relevan kepada kes ini. Mahkamah bersetuju dengan prinsip yang dinyatakan yang mana ia dicengkam dengan bidang kuasa untuk memutuskan permohonan responden dan juga untuk mempertimbangkan merit alasan-alasan yang dikemukakan untuk pendengaran semula petisyen (lihat perenggan 6).

(2) Apabila mahkamah memeriksa keterangan afidavit responden yang tidak ditentang dan disangkal terutamanya atas pemindahan sebahagian syer dalam hartanah perkahwinan dan penafian akses kepada anak-anak kepada perkahwinan dan juga fakta bahawa responden suami tidak diberitahu mengenai permohonan untuk membuat dekri nisi mutlak, pemberian permohonan ini adalah kesimpulan yang tidak dapat dielakkan (lihat perenggan 8).

(3) Mahkamah memerintah permohonan pertama dibatalkan tanpa perintah kepada kos; bahawa kedua-dua dekri diketepikan dan akan terdapat pendengaran semula petisyen; bahawa responden diberi izin untuk memfailkan jawapannya kepada petisyen dalam masa 14 hari dari hari ini dan pempetisyen, jawapannya, dalam masa 14 hari dari tarikh penyerahan jawapan kepada petisyen tersebut; dan kos permohonan

kedua ditanggung oleh responden sendiri atas fakta bahawa terdapat penyerahan biasa petisyen tersebut (lihat perenggan 9).]

Cases referred to

Chng Yock Eng v Kwa Teck Meng [2004] SGDC 268 (folld)
Low Choon Kung v Tham Chan Kum (mw) [2004] SGDC 139 (refd)
Nash v Nash [1967] 1 All ER 535 (refd)
Stevens v Stevens [1965] 1 All ER 1003, CA (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 r 44

Petitioner's wife in person.
Shankar Ram (Daniel Ling with him) (Thomas, Shankar Ram & Co) for the husband respondent.

Rhodzariah Bujang J:

RULING

[1] This short ruling is given in respect of an application filed by the husband respondent to set aside both the decree nisi and decree absolute granted by the court on 3 October 2012 and 25 February 2013, respectively. In fact, two notices of application were filed. The earlier one was to set aside the decree nisi but after its filing and before it was heard the decree was made absolute. Thus, the filing of a second one, which was necessitated by event. Despite the filing of this second application, the first was not withdrawn by the husband respondent although it has been rendered superflous by the filing of the second one. I must also mentioned that I had earlier, on 25 February 2013 dismiss a similar application to set aside the decree nisi filed by the husband respondent on a technical ground ie that he failed to invoke r 44 of the Divorce and Matrimonial Proceedings Rules 1980 but gave him liberty to file afresh application and for which this ruling is made.

SETTING ASIDE OF THE DECREES

[2] When the decree nisi was granted at a hearing conducted by myself, the husband respondent was absent. According to the court document, the petition was served, as did the notice of hearing of the petition, to the husband respondent by way of publication in the newspaper, the *Star*. In the affidavit on non-service filed in support of the application for substituted service, it was deposed by the process-server (a clerk of Messrs Voon & Co, the firm of advocate representing the wife petitioner) that the husband respondent was approached by him and Mr Voon Lee Shan on 29 June 2012 with the divorce papers but he refused to accept the same. An earlier attempt at service failed

because the husband respondent was not at his given address which is in Bau, a small town in the district of the Kuching, Sarawak.

[3] Obviously from that personal meeting in which the wife petitioner also happened to be present, the husband respondent should be aware of the proceedings but according to his affidavit in support he did not want to sign any documents then because it might prejudice him and he was also labouring under a misconception at that time that the meeting was for the purpose of reconciliation. He said only after being served with the decree nisi which he showed his sister who is a teacher and upon her advice did he go to the office of his counsel, Mr Shankar Ram for legal advice. The terms of the decree nisi was obviously against his interest, both personal and financial in that he was not given any access to his children and had to give her a share in an inherited property which he co-owned with a sister and another which is still under a bank loan. He said he had given her a half share in the matrimonial house which the wife petitioner subsequently sold. He also deposed that being only a form five school leaver he has problems understanding English and that the wife petitioner who is a university graduate and a teacher could well afford to maintain herself.

[4] Despite these two applications being served on the wife petitioner as well as on the advocate representing her at the hearing of the petition, Mr Voon Lee Shan, the wife petitioner also did not appear at the hearing of the application.

[5] In the joint written submission of his two counsel, Mr Shankar Ram and Mr Daniel Ling, I was referred to decision of the Singapore District Court *Chng Yock Eng v Kwa Teck Meng* [2004] SGDC 268 in which the judge was moved to set aside the decree nisi and absolute on the merits, following the decision of another district court in *Low Choon Kung v Tham Chan Kum (mw)* [2004] SGDC 139 which had been affirmed by the High Court on appeal. This decision was made despite the judge finding that the petition had been properly served by substituted service to the respondent. Under the sub-heading, 'Rescinding Decrees Absolute', this is what the judge said:

> The court in *Low Choon Kung*, had also held that the decree absolute be set aside. This decision illustrates not only that the decree absolute may be set aside, but the mere fact that a decree absolute had been issued is not an automatic bar to the rescission of the decree nisi. The English cases of *Wiseman v Wiseman* [1953] 1 All ER 601, cited and discussed at length in *Low Choon Kung*, *Monynihan v Monynihan* [1997] 1 FLR 59, and *Ebrahim v Ali (Otherwise Ebrahim) and Queen's Proctor (Intervening)* [1984] FLR 95) all feature decrees absolute being rescinded or declared void by the court. Admittedly in all these English cases, there had been procedural irregularities in the service of the divorce petitions. However, I am of the view that the court should have the power to rescind a decree absolute even if there has been procedural regularity in service, if circumstances exist which justify the rescission of the decree nisi. The reason for this is that it would be wrong in principle if the court's

> ability to deal with a situation which warrants a rescission of the decree nisi (ie by rescinding the decree nisi) depended on whether a decree absolute happened to have been issued or not. Thus, if the court sees fit to rescind a decree nisi, it should be able to do so, whether or not a decree absolute exists. If a decree absolute exists, then the court should also be able to rescind the decree absolute — indeed, if the decree nisi is rescinded, the decree absolute must also be rescinded, as the latter is an order which is issued to perfect the former, and should not be able to exist without it.

[6] First, I must say that this decision is not that of the High Court of Singapore which would be highly persuasive to me but I acknowledge that there the district court (which is equivalent to our sessions court) has jurisdiction over divorce and matrimonial matters and given its jurisdiction is like the High Court in Malaysia, the ratio is still relevant to this case. I find myself to be in agreement with the principle so stated such that I consider myself being seized with the jurisdiction to entertain the application of the husband respondent and to also consider the merits of the grounds he advanced for a re-hearing of the petition.

[7] The husband respondent's counsel have highlighted to me a passage from the decision of the English Court of Appeal's case of Davies LJ in *Stevens v Stevens* [1965] 1 All ER 1003 which was in turn quoted with approval in *Nash v Nash* [1967] 1 All ER 535 where His Lordship said:

> As it seems to me, these applications in the divisional court fall into at least two classes. There is the class where the applicant comes along and says 'I was not served; I knew nothing about it, or 'I was deceived: all the proceedings took place behind my back'. In that sort of case the applicant gets a re-hearing almost automatically. *The other class of case is the Winter class of case, the Tucker class of case, and this class of case, where an applicant may come along and say 'I knew all about this: I choose not to defend; but it was all wrong — let me defend now and grant me a re-hearing'. In a case of that latter kind, speaking for myself, I thing that for an applicant to succeed he has to convince the divisional court, or this court if it comes before this court, that on the evidence before the court on the application as a whole it is more probable that the decree was obtained contrary to the justice of the case*. (Emphasis added.)

[8] I believe this quotation is a good guide to go by and the wife petitioner in my view falls into that last category of cases. When I examined the unopposed and uncontradicted affidavit evidence of the husband respondent in particular on the transfer of the half share in the matrimonial property and the blanket denial of access to the children of the marriage as well as the fact that the husband respondent was not informed of the application to make the decree nisi absolute, the granting of this application is a foregone conclusion.

[9] I would therefore order as follows:

(a) the first application is struck out with no order as to cost;

(b) that both the decrees be set aside and that there be a re-hearing of the petition;

(c) that the husband respondent be given leave to file his answer to the petition within 14 days from today and the wife petitioner, her reply, within 14 days from the date of service of the said answer to the petition; and

(d) cost of this second application is to be borne by the husband respondent himself on account of fact that there was regular service of the petition.

Order accordingly.

Reported by Afiq Mohamad Noor